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EFFECT OF PRELIMINARY HEARING ON ACTION FOR MALICIOUS PROSECUTION

In the case of Wingersky v. E. E. Gray Company, 150 N. E. 164, decided by the Supreme Judicial Court of Massachusetts on January 7, 1926, there is an interesting opinion relating to the effect upon a subsequent action for malicious prosecution of the holding by the Committing Magistrate of the accused for trial in a superior court. The plaintiff had been accused by defendant of the crime of larceny and receiving stolen goods. On the latter count the accused was discharged by the magistrate, but was held for trial upon the larceny count and subsequently acquitted after trial. The Court held that a single prosecution had been instituted and the discharge on the receiving count could not aid plaintiff unless there had been lack of probable cause as to the larceny count. Two causes of action could not be predicated upon a single prosecution merely because the information or indictment contained two charges, one of which was untenable in law. The importance of the case is in the holding of the court that where the accused is held for trial by the Committing Magistrate, although subsequently discharged after trial, there exists as a matter of law probable cause for the prosecution which is a bar to the action.

A portion of the learned Court's opinion follows:

"In the municipal court the plaintiff was found guilty of larceny on the complaint set forth in the second count. Although not specifically so alleged, that is a necessary and inevitable conclusion from the other facts therein alleged. The case must be considered on that footing. A finding of guilty in the municipal court on the complaint charging the plaintiff with larceny was conclusive proof of probable cause to make the complaint even though followed, on appeal to the superior court, by a verdict of not guilty, unless the conviction can be impeached on some ground recognized by the law, such as fraud, conspiracy, perjury or subornation of perjury as its sole foundation. The second count standing alone, in the light of all the facts alleged, sets out no cause of action because of the finding of guilty in the court of first instance.

"It would be contrary to underlying principles of the law of malicious prosecution to permit the plaintiff to recover on the first or third count in view of the finding in the municipal court of guilt on the larceny complaint. It is the duty of every member of society to see to it that crime is punished so far as lies in his power. Where one acts with probable cause and in good faith in making a complaint to the proper court, he ought not to be permitted by the law to be harassed. This kind of action is not to be favored and ought not to be encouraged. Its extension beyond bounds already established would have a 'tendency to deter men who know of breaches of the law, from prosecuting offenders, thereby endangering the order and peace of the community.' "

Referring to the necessity for the doctrine last above adverted to, the Court, in McCarthy v. Barrett, 144 App. Div. 727, 129 N. Y. Supp. 705, said:

"If so, then it will become quite difficult to secure a prosecutor, and the administration of the criminal law will be all the more difficult. It is this very consideration which underlies the policy of the law in making the preliminary question of probable cause one for the decision of the court itself."

"I could relate instances that would arouse your righteous wrath!" declared Hon. Thomas Roft in the midst of his address. "I could tell you things that would make you blush—"

"Tell us! Tell us!" cried several eager voices from the crowd.

NOTES OF IMPORTANT DECISIONS

STATUTE MAKING INSUFFICIENT FUNDS IN BANK TO MEET CHECK EVIDENCE OF FRAUD, INVALID.—The cases of Goolsby v. State, 104 So. 901, 104 So. 906 (Supreme Court of Alabama), hold that a statute of Alabama making it unlawful to obtain money or credit by check or order which is not paid by drawee, and not refunded on written demand, and making fact that there are not sufficient funds on deposit at time instrument is presented for and refused payment prima facie evidence of fraudulent intent, is unconstitutional.

We quote a portion of the Court's opinion:

"In application of the foregoing to the statute, tested by organic law, it is noted that a prima facie presumption created by the Legislature in practical effect might prove conclusive or irresistible, and strip a defendant, by reason of such statute, 'of the presumption of innocence' (Bailey v. Alabama, 219 U. S. 219, 234, 31 S. Ct. 145, 55 L. Ed. 191, 198), and expose him to conviction for fraud, *when fraud has not been shown*, but merely that there was not sufficient money in the bank to cover the check, order, or draft, *not at the time the same was drawn*, but *at the time the same was presented for and refused payment*. It is not the implication that there were sufficient funds in bank when the check, order, or draft was drawn to warrant payment that affects the present question; that question being the constitutionality vel non of a law which makes one fact prima facie evidence of a *fraudulent intent*, without providing that the accused may give in evidence his circumstances and *uncommunicated intent* when so acting, which in reality deprives the accused of the right to make full answer to the accusation supported by the prima facie rule of evidence created by the statute. Bailey v. Alabama, 219 U. S. 219, 31 S. Ct. 145, 55 L. Ed. 191; Mobile J. & K. C. R. R. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A. 463.

"In Holmes v. State, 136 Ala. 80, 34 So. 180, McCormick v. Joseph, 77 Ala. 236, Wheless v. Rhodes, 70 Ala. 419, Whizenant v. State, 71 Ala. 383, and Burke v. State, Id. 377, the fact is touched upon that the defendant is not allowed to testify to his uncommunicated motives, purpose, or intention, and such is not allowed under the statute for the purpose of rebutting the statutory presumption. Bailey v. State, supra. A casual examination of the statute (Acts 1921, p. 47) discloses that it is not the fact that the drawer or maker has not on deposit sufficient funds to cover the instrument at the time it is drawn or made, but the fact that there are not sufficient funds on deposit with the drawee *at the time that instrument is presented for and refused payment*, which is prima facie evidence of a *fraudulent intent*. Even though there were sufficient funds with the drawee at the time the instrument was executed, if, at the time it is presented by the payee, the defendant has not such funds on deposit and payment is refused, he is made prima facie guilty of a *fraudulent intent*. And so of a postdated check or order that is not paid by the drawee, on the other hand, though such funds were nonexistent when the instrument was drawn or delivered, but were sufficient, when presented, to warrant payment, or if payment is made, no prima facie evidence of a fraudulent intent exists, or no such presumption could be indulged against the defendant. This is sufficient to illustrate the effect of the statute which declares the prima facie evidence of a fraudulent intent, *not based on the existence of a fact*, but upon a future contingency to which other parties than the defendant might contribute—as (1) the payment vel non when presentment is made; or (2) the giving of the required notice of dishonor."

The first of the cases mentioned holds that a statute providing punishment for fraud or misrepresentations which amount to false pretenses in obtaining money or other property by check, draft, or order which is not paid, is constitutional.

OPERATION OF AUTOMOBILE BY PERSON OF PROHIBITED AGE AS AVOIDING INSURANCE POLICY.—Wagoner v. Fidelity & Casualty Co., 213 N. Y. Supp. 188, holds that under the New York Highway Law (sec. 282, subd. 2) prohibiting operation of automobile by person under 18, unless accompanied by licensed chauffeur or owner, accident occurring while automobile was driven by 17-year-old boy, unaccompanied by licensed chauffeur or owner, causing another's death, was not covered by policy providing that it did not cover liability, where automobile was operated by person under age fixed by law for drivers of automobiles.

Golf Widow: My husband accused me of doing nothing but chase around to afternoon teas.

Friend: What did you say?

Golf Widow: I reminded him that that was how he spent his own afternoons, chasing from one tee to another.

COMPULSORY BIBLE READING IN PUBLIC SCHOOLS

Part II

By Albert Levitt

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Can sectarian religious instruction be given in the public schools?

A. A case which presents this question in its clearest light is Board of Education v. Minor[39], because of the facts that in this case the constitutional provisions considered indicated that the fostering of religion was a function of government and an attempt was made to compel Bible reading as part of a public school exercise. The facts were these:

(a) The Constitution provided in Article 1, section 7, that "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect, or support any place of worship against his consent, and no preference shall be given, by law, to any religious society, nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious beliefs. Religion, morality and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceful enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."

Article 6, section 2, stated that "The General Assembly shall make such provisions by taxation or otherwise, as, with income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of this state."

(b) A school board in the state passed the following rule:

"The opening exercises in every department shall commence by reading a portion of the Bible by or under the direction of the teacher, and appropriate singing by the pupils."

This rule was in effect for nearly twenty-five years. A new board then repealed the foregoing rule and passed the following one:

"Religious instruction and the reading of religious books, including the Holy Bible, are prohibited in the common schools of Cincinnati, it being the true object and intent of this rule to allow the children of the parents of all sects and opinions in matters of faith and worship, to enjoy alike the benefit of the common school fund."

(c) A taxpayer brought suit to enjoin the enforcement of the new rule and to compel the retention of religious instruction and services in the schools.

The Court put the question before it as being:

"Do the laws of Ohio clothe its courts with power to interfere either by injunction or mandate, to compel religious instruction and the reading of religious books in the public schools of the state."[40]

In reply to this question the Court said:

"We are referred to no provision of the Federal Constitution, nor to any enactment of the State Legislature conferring such a power."

The Court further decided that the State Constitution did not give such power.

It was contended by the plaintiff that the word "religion" in the State Constitution meant "Christian religion" and that the phrase "religious denomination" meant "Christian denomination." But, the Court squarely rejected this contention. It said:

The constitutional requirement "means a free conflict of opinions as to things

(39) 23 Ohio State 211 (1872).

(40) Page 240.

divine; and it means masterly inactivity on the part of the state, except for the purpose of keeping the conflict free, and preventing the violation of private rights or of the public peace. Meantime the state will impartially aid all parties in their struggle after religious truth, by providing means for the increase of general knowledge which is the handmaid of good government, as well as of true religion and morality."[41]

The case definitely indicates that the courts will not compel religious instruction in the public schools and will uphold the school authorities in refusing to have Bible reading in the public schools. The weight of authority is with this case. There are some cases contra. Because of the importance of the question it is deemed advisable to present rather full abstracts of the cases in the body of the text rather than to relegate them to a footnote.

B. *Cases holding that religious sectarian instruction in the public schools is unconstitutional:*

(i) State v. School Board, 44 N. W. 967 (1890). By order of the school board the Bible is read in the public schools. Some Catholic citizens ask that the court issue a mandamus to stop the Bible reading on the ground that it is contra their religious beliefs. The school board defends on the ground that the Bible is used as a text book and that the school board has the constitutional right to prescribe which text books should be used in the public schools. The question was, whether or not reading from the King James version of the Bible was sectarian instruction. The court held that it was. The Court said:

"Courts take judicial notice of various christian and non-christian sects in the state, and that some or all have doctrinal differences, and that they rely on various proof texts; that the Bible means the entire Bible, and that there are doctrinal passages in it about which the sects differ." (P. 972.)

"It should be said that the term 'religious sect' is understood as applying to people believing in the same religious doctrines who are more or less closely associated or organized to advance such doctrines, and increase the number of believers therein. The doctrines of one of these sects which are not common to all the others are sectarian; and the term 'sectarian' is we think used in that sense in the Constitution." (P. 973.)

"The term 'sectarian instruction' in the Constitution manifestly refers exclusively to instruction in religious doctrines, and the prohibition is only aimed at such instruction as is sectarian; that is to say instruction in religious doctrines which are believed by some religious sects and rejected by others. Hence to teach the existence of a Supreme Being, of infinite power, wisdom and goodness, and that it is the highest duty of all men to adore, obey and love Him, is not sectarian because all religious sects so believe and teach. The instruction becomes sectarian when it goes further and inculcates doctrine and dogma concerning which the religions are in conflict. This we understand to be the meaning of the constitutional provision. That the reading from the Bible in the schools although unaccompanied by any comment on the part of the teacher is 'instruction' seems to us too clear for comment. Some of the most valuable instruction a person can receive may be derived from reading alone, without any extrinsic aid by way of comment or exposition. The question therefore seems to narrow down to this: Is the reading of the Bible in the schools—not merely selected passages therefrom but the whole of it—sectarian instruction of the pupils? In view of the fact already mentioned that the Bible contains numerous doctrinal passages upon some of which the peculiar creed of almost every religious sect is based, and that such passages may reasonably be understood to inculcate the doctrines predicated upon them, an affirmative answer seems unavoidable." (P. 973.) The Court then goes into the history of the constitutional provision and continues: "Is it unreasonable to say that sectarian instruction was thus excluded, to the end that the child of the Jew, or Catholic, or Unitarian, or Universalist, or Quaker should not be compelled to listen to the stated readings of passages of scripture which are accepted by others as giving the lie to the religious faith and belief of their parents and themselves? . . . The priceless truths of the Bible are best taught to our youth in the churches, the sabbath and parochial schools, the social and religious meetings, and, above all, by parents in the home circle." (P. 975.)

(41) Ibid, at page 251.

(ii) People v. Board of Education, 92 N. E. 25 251 (Ill. 1910). In this case there was an opening service in the school rooms where the Bible was read, hymns were sung and the Lord's Prayer was repeated. Some Catholic citizens objected to the continuance of the services. The question was whether or not the services violated the constitutional provisions guaranteeing religious freedom. (Const. Art. 2, par. 3.) The Court held that they did; that reading the Bible was instruction and that reading the Bible in the public school is sectarian instruction, as the Bible is a sectarian book. The Court said:

"The wrong arises not out of the particular version of the Bible or form of prayer used—whether that found in the Douay or King James version—or the particular songs sung, but out of the compulsion to join in any form of worship. The free enjoyment of religious worship includes the freedom not to worship." (P. 252.)

"The only means of preventing sectarian instruction in the school is to exclude altogether religious instruction by means of the reading of the Bible or otherwise. The Bible is not read in the schools as mere literature or mere history. It cannot be separated from its character as an inspired book of religion." (P. 255.)

(iii) Harold v. Parish Board, 68 Sou. 116 (La. 1915). Both the Old and the New Testaments were read in the public schools. A father of one of the Jewish children who were attending the school objected to the Bible reading. The question was whether the Bible reading was a preference given to Christians and a discrimination made against the Jews. The court held that the reading of the Bible was a violation of the Constitution. (Constitution Arts. 4, 53.) The Court said:

"It is a fact that the reading of the Bible is religious instruction and when the New Testament is read it is Christian instruction. The character of the book is that it is a pious one, and it is essentially religious. . . . One of the most important forms of instruction is reading and it is impossible to read from the New Testament without giving instruction in Christianity. . . . As God is the author of the book He is necessarily worshipped in the reading of it. . . . The reading of the New Testament as the word of God infringes on the religious scruples of the Jews." (P. 121.)

(iv) Stevenson v. Hanyon, 4 Pa. Dist. R. 395. Here the school was opened with religious services after the form of worship of the Methodist Episcopal Church and consisted of responsive readings from the King James version of the Bible, scripture reading and hymn-singing. An injunction was asked against the continuance of such services. It was held that the injunction would issue as they were contra the provisions of the Constitution guaranteeing religious freedom.

(v) State v. Frazier, 173, P. 35 (Wash. 1918). The Constitution provided that "No public money or property shall be appropriated for, or applied to, any religious worship, exercise or instruction, or the support of any religious establishment" (Art. 1, par. 11) and that "All schools supported in whole or in part by the public funds shall be forever free from sectarian control or influence." (Art. 9, par. 4.)

The School Board passed a resolution allowing the pupils in the public high schools to get credit for high school work if they passed an examination in Old and New Testament History. The School Board furnished the outline of history to be studied. The instruction and the examinations were given by the religious organizations to which the several pupils belonged. One of the pupils took the course and passed the examination. A superintendent of a high school refused to give the pupil credit for the work done. The courts were asked to compel the superintendent to give the required credits. The courts refused to mandamus the superintendent on the ground that the resolution of the School Board was unconstitutional. The Court stated the question to be:

"Our inquiry may be limited then to one question, whether an examination upon 'the historical, biographical, narratives and literary features of the Bible is religious instruction within the meaning of the Constitution?'" (P. 37.) The Court held that it was and said:

"We have then, not only, 'religious exercise' and 'instruction' which is forbidden, but their natural consequences—religious discussion and controversy." (P. 37.) "The vice of the present plan is that school credit is to be given for instruction at the hands of sectarian agents." (P. 38.)

(vi) State v. Sheve, 93 N. W. 169 (1902). Although in this case the Court expressly disclaims deciding the validity of compulsory Bible reading and states that "the legitimate" use of the Bible is a matter for legislative and not judicial determination, still the decision is closely in line with the foregoing ones and is of value as showing that probably sectarian instruction in the public schools would be deemed unconstitutional.

The facts were that a teacher in one of the public schools opened her classes with a regular morning service that consisted of a formal or improvised prayer, followed by the singing of Gospel Hymns. During the prayer the pupils were compelled to rise in their seats and stand in an attitude of reverence. The teacher conducted these services because of her religious convictions. There does not seem to have been any order by the school authorities which called for such services. The services were objected to by some of the parents of the pupils. The question was whether the services were infringements upon the religious freedom of the children. The Court held that they were. The constitutional provision read:

"Religion, morality and knowledge, however, being essential to good government it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own modes of public worship and to encourage schools and the means of instruction." (Bill of Rights, Section 4.)

The syllabus written by the Court is as follows:

"1. The right of all persons to worship Almighty God according to the dictates of their own consciences is declared by the Constitution of this State to be a natural and indefeasible right.

2. There is nothing in the Constitution or laws of this State, nor in the history of our people, upon which to ground a claim that it is the duty of government to teach religion.

3. The whole duty of the State with respect to religion, is 'to protect every religious denomination in the peaceable enjoyment of its own modes of worship.'

4. Enforced attendance upon religious services is forbidden by the Constitution, and pupils in a public school cannot be required either to join in them or to attend such services.

5. A teacher in a public school being vested during school hours with a general authority over his pupils, his requests are practically commands.

6. It is immaterial whether the objection of a parent to his children attending and participating in a religious service conducted in a school-room by a teacher during school hours is reasonable or unreasonable. The right to be unreasonable in such matters is guaranteed by the Constitution.

7. The law does not forbid the use of the Bible in the public schools; it is not proscribed either by the Constitution or the statutes; and the courts have no right to declare its use to be unlawful because it is possible or probable that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions.

8. The point where the courts may rightfully interfere to prevent the use of the Bible in a public school is where legitimate use has degenerated into abuse—where a teacher employed to give secular instruction has violated the Constitution by becoming a sectarian propagandist.

9. Whether it is prudent or politic to permit Bible reading in the public schools is a question for the school authorities, but whether the practice of Bible reading has taken the form of sectarian instruction is a question for the courts to determine upon evidence.

10. It will not be presumed in any case that a law has been violated. Every alleged violation must be established by competent proof."

In connection with the privilege which the individual teacher has to promote her own type of religious belief in the public schools, three cases are of considerable interest.

(a) Hysong v. Gallitzin School District, 30 Atl. 482 (Pa. 1894). In this case Sisters of the Order of St. Joseph, a religious organization connected with the Catholic Church, were employed as teachers in the public school. They performed their duties while garbed in the dress of the Sisterhood. Non-Catholics objected to their teaching while so garbed. The question was whether the Sisters were properly employed as teachers and whether they were permitted to teach while wearing their distinctive religious dress. The Court held that the School Board did not

exceed its authority in hiring the Sisters to teach, and that the Sisters were privileged to wear their distinctive religious dress while teaching.

There was a strong dissenting opinion, however, in which it was keenly pointed out that the Sisters were under the direct supervision of their ecclesiastical superiors and that teaching was to them a definite religious duty.

(b) O'Connor v. Hendrick, 184 N. Y. 421, 77 N. E. 612 (1906). In this case Catholic Sisters had been employed as teachers in the public schools. Then the Superintendent of Public Schools promulgated an order which prohibited teachers in the public schools from wearing any distinctive garb of a sectarian character while teaching. The reason for the promulgation of the rule was the desire to avoid all sectarian influences in the public schools. A Sister, who was a teacher, refused to obey the rule. The Superintendent made no move against her. She assigned part of her salary earned thereafter to the plaintiff. He demanded the money from the Superintendent who refused to pay on the ground that the Sister had nothing to assign after she had refused to obey the order regarding proper dress in the public schools. The question was whether or not this order was an infringement on the religious freedom of the teacher. The Court held that it was not, and added:

"In reaching this result, however, I do not wish to be understood as acquiescing in that part of the opinion below in which it is asserted that 'these Sisters should never be permitted to teach in our public schools.' There is no reason why they or any other qualified persons should not be allowed thus to teach, whatever may be their religious convictions, provided that they do not by their acts as teachers promote any denominational doctrine or tenet." (P. 430.)

(c) Commonwealth v. Herr, 78 Atl. 68 (Pa. 1910). The Constitution provided that

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. . . . No human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship." (Section 3.)

"No person who acknowledges the being of a God, and a future state of rewards and punishments shall on account of his religious sentiments be disqualified to hold any office or place of trust or profit under this Commonwealth." (Section 4.)

The legislature passed an act which read:

"No teacher in any school of this Commonwealth shall wear in said school or whilst engaged in the performance of his or her duty as such teacher any dress, mark, emblem, or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination." For the first offense the teacher was to be suspended for the period of one year and for the second offense she was to be permanently disqualified from teaching in the district. The directors of the several schools districts were given the duty, under penalty, of enforcing the law.

A teacher in one of the school districts appeared in forbidden garb. One of the directors called upon the others to carry out the statute and suspend the teacher. He was outvoted by the other directors. Then all of the directors were indicted for violating the statute. The question was whether the statute would sustain a conviction or whether it was invalid as contra the Constitutional guaranty of freedom of religion. It was held that the statute was valid and that the directors, other than the one who had tried to enforce the statute, were properly indicted. The Court said:

"We cannot assent to the proposition that the intent or effect of the legislation is to disqualify any person from employment as a teacher 'on account of his religious sentiments.' It is directed against acts, not beliefs, and only against acts of the teacher whilst engaged in the performance of his or her duties as such teacher. It is true that the acts prohibited are those which may indicate, and indeed may be dictated by, the religious sentiments of the teacher. Therefore, we are led to the broader inquiry whether this constitutes an infringement of the 'natural and indefeasible right of all men to worship Almighty God according to the dictates of their own consciences' or contravenes the declaration that 'no human authority can in any case whatever control or interfere with the rights of' conscience. . . . . No man's re-

ligious belief may be interefered with by law. . . . The rights of conscience are no less sacred than the rights of property. . . . But broad as are these declarations of our Constitution and sacred as are the religious freedom and rights of conscience they secure, yet it must be apparent to any person upon reflection, and has been repeatedly declared by the highest judicial authority, that they do not mean unqualifiedly that it is beyond the power of the legislature to enact any law which will restrain individuals from doing that which, if it were not for the law, their consciences would teach them to be their moral or religious duty. Indeed, it is impossible to see how civil government could exist, if the dictates of the individual conscience were in every instance where they come in conflict with the law of the land, the paramount rule of action. . . . The right of an individual to clothe himself in whatever garb his taste, the tenets of his sect, or even his religious sentiments may dictate is no more absolute than his right to give utterance to his sentiments, religious or otherwise. In neither case can it be said that a statute cannot restrain him from exercising these rights whenever, wherever and in whatever manner he consciously believes it to be his moral or religious duty to do so." (P. 72.) The Court then decided that the purpose of the statute was to avoid and exclude all appearances of sectarian instruction in the public schools and thus was within the power of the legislature.

It is to be noted in regard to these preceding cases that the question really turned on the power to prevent sectarian instruction from becoming prevalent in the public schools. It would seem to follow, a fortiori, that it is beyond the power of an individual teacher or the legislature to compel such sectarian instruction. For, if religious freedom will not allow sectarian instruction when there is no compulsion about it, it surely will prevent compulsory sectarian instruction.

Summary. The foregoing cases estab lish the legal proposition that there can be no compulsory, sectarian religious instruction in the public schools.

C. *Cases holding that compulsory sectarian religious instruction in the public schools is constitutional.*

Some of the decided cases in dealing with the foregoing problem have held that sectarian religious instruction, or Bible reading, is constitutional:

(i) Donahue v. Richards, 61 Am. Dec. 256 (Me. 1854). The school authorities had prescribed the use of the Bible as a reading book in the public schools. A pupil who was a member of the Catholic Church refused to read from the Authorized version of the Bible which had been prescribed but was willing to read from the Douay Bible. The school authorities refused to let her read from the Douay Bible. She was then expelled for refusing to read from the Authorized version of the Bible. She sued the school authorities for damages resulting from the expulsion. The question was whether the school authorities acted beyond their powers. The Court held that they had not and that the pupil had no cause of action. They further held that prescribing the Authorized version of the Bible as a reading book was not a violation of the State Constitution, which read:

"No one shall be hurt, molested or restrained in his person, liberty or estate for worshipping God in the manner, and season most agreeable to the dictates of his own conscience, or for his religious professions or sentiments, provided he does not disturb the public peace nor obstruct others in their religious worship." (Art. 1, sec. 3.)

In dealing with the constitutional provisions the Court held that:

(a) The requirement that the Protestant or any version of the Bible be read in the public schools is not a violation of the letter or the spirit of the Constitution because the Constitution was intended to prevent the imposition of pains, penalties, imprisonments or the deprivation of political rights as a penalty for religious professions and opinions;

(b) The requirements that a particular version of the Bible be used as a reading book by pupils who may conscientiously believe it to have been erroneously made, is not an imposition of hurt, molestation or restraint upon religious worship or sentiments, nor of a religious test; nor is it a subordination or preference of any sect or denomination to another;

(c) The pupil cannot be excused from reading in duly prescribed text-books because of religious scruples;

(d) A conscientious belief of religious duty furnishes no legal defense to the doing or refusing to do what the state, within its constitutional authority may require.

It is to be noted in this case that the pupil really had no conscientious scruples about reading the Bible but objected to the version of the Bible which was prescribed. In this far, at least, the case is not an authority for saying that it is constitutional to require pupils who honestly have genuine religious scruples about reading the Bible or listening to it being read may be compelled to listen to it or read or otherwise be deprived of school privileges. At the most this case stands for the legal proposition that the school authorities may use the Bible as a reading book when teaching reading.

(ii) Spiller v. Woburn, 12 Allen 127 (Mass. 1866). The School Board passed a rule that the school should be opened with readings from the Bible and with prayer; and that during the prayer the pupils should bow their heads. At the request of the parents the pupil could be excused from bowing her head. S, the pupil, refused to bow her head. Her father refused to ask that she be excused from bowing her head. She was expelled from school for refusing to bow her head. Her father sues in tort to get damages for her expulsion. The question was whether the school authorities had the legal right to pass the above rules. The Court held that they had, and said:

"No more appropriate method could be adopted of keeping in mind of both teachers and scholars that one of the chief objects of education, as declared by the statutes of this Commonwealth and which teachers are especially enjoined to carry into effect is 'to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice, and a sacred regard for truth.' . . . We do not mean to say that it would be competent for a school committee to pass an order or regulation requiring pupils to conform to any religious rite or observance, or to go through any religious forms or ceremonies which were inconsistent with or contrary to their religious convictions or conscientious scruples. Such a requirement would be a violation of the spirit of the clause of the Constitution, part 1, article 2, which provides that no one should be hurt or molested in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience; and it would also be inconsistent with the plain intention of the legislature in providing that no one should be excluded from a public school on account of religious opinions, Gen. Stats., c. 41, par. 9; and in requiring that the daily reading of the Bible in public schools shall be without written note or oral comment, and in providing that no pupil shall be called on to read any particular version whose parent or guardian shall declare that he has conscientious scruples against allowing him to read therefrom, Stats. 1862, c. 57. Having in view the manifest spirit and intention of these provisions, an order or regulation by a school committee which would require a pupil to join in a religious rite or ceremony contrary to his or her religious opinions, or those of a parent or guardian, would be clearly unreasonable and invalid. . . . But we are unable to see that the regulation with which the plaintiff was required to comply can be justly said to fall within this category. In the first place it did not prescribe an act which was necessarily one of religions devotion or religious ceremony. It went no further than to require the observance of quiet and decorum during the religious service with which the school was opened. It did not compel a pupil to join in prayer, but only to assume an attitude which was calculated to prevent interruption by avoiding all communication with others during the service. In the next place the regulation did not require a pupil to comply with that part prescribing the position of the head during the prayer if the parent requested a child to be excused from it. . . . Under these circumstances, it not appearing that the plaintiff made any objection to a compliance with the regulation in obedience to the will of her father, we are of the opinion that her exclusion from the school was justifiable and furnishes no ground of action." (Pp. 129-30.)

It is submitted, with all due respect, that the Court here "strained at a gnat and swallowed a camel!" Bowing the head at time of prayer is very definitely an act of reverence and worship. It is a religious rite. That it may be also be a method of keeping quiet does not alter its character as a religious rite. Furthermore, it is most obvious that the purpose

for which the head is bowed is a religious purpose. The pupil can be just as quiet with her head unbowed as with her head bowed. And a child can be most unquiet and create much disturbance with bowed as with unbowed head. It is such reasons for decisions as these which bring the law into disrepute.

(iii) Moore v. Monroe, 20 N. W. 475 (Iowa 1884). The Constitution provided in its Bill of Rights, Article 1, paragraph 3, that

"The General Assembly shall make no laws respecting an establishment of religion, or prohibiting free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes taxes or other rates for building or repairing places of worship or the maintenance of any minister or ministry."

The Code, section 1764, provided that:

"The Bible shall not be excluded from any school or institution in this state, nor shall any pupil be required to read it contrary to the wishes of its parent or guardian."

The facts were that the teachers in the pulic schools were accustomed to take a few minutes each morning to read selections from the Bible, repeat the Lord's Prayer, and sing religious songs. Those children who did not wish to take part were not compelled to attend. The plaintiff had two children in a school. He objected to the religious exercises and asked the School Board to stop having them. The board refused. He asks the court to restrain the continuance of the services on the ground that they were unconstitutional. The court refused to interfere. It held, that although the methods of the teachers did not wholly exclude the idea of worship during the exercises, and that during the time of the continuance of the services the school did become a place of worship, the Constitution did not prohibit the use of the school house as a "*casual*" place of worship. So that so long as the children were not compelled to attend the services they could not complain. (P. 476.) The Court then goes on to say:

"Possibly the plaintiff is a propagandist and regards himself charged with a mission to destroy the influence of the Bible. Whether this be so or not, it is sufficient to say that the courts are charged with no such mission." (P. 576.)

It is to be noted in connection with this case that there is absolutely nothing in the facts presented to the court, or in the argument made before it, which lends itself in any way to the inference made in the language last quoted. It was a gratuitous, uncalled for and unwarranted statement. Furthermore, it is difficult to accept the Court's interpretation of the Constitution if once it admits, as this Court did, that a school becomes a place of worship during the period when the religious services are being held. How it could be a "casual place of worship" when services are held in it every day is beyond our comprehension. One wonders how many services a day would be required to make the school room other than a "casual" place of worship.[41a]

(iv) Pfeiffer v. Board of Education, 77 N. W. 250 (Mich. 1898). The constitutional provisions were as follows:

"Sec. 39. The legislature shall pass no law to prevent any person from worshipping Almighty God according to the dictates of his own conscience or compel any person to attend, erect or support any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion.

Sec. 40. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the state be appropriated for any such purposes.

Sec. 41. The legislature shall not diminish or enlarge the civil or political rights, privileges or capacities of any person on account of his opinion or belief concerning religion."

The facts were that the Board of Education of the City of Detroit, Michigan, purchased copies of a book called "Readings from the Bible." It directed that daily readings be made from that book. No teacher was required to give instruction from the book "except such as is absolutely necessary for the use of the same as a supplemental text-book on reading." No teacher is allowed to make any note or comment on anything in the book. Any

(41a) Nearly twenty-five years after this case was decided the courts of Iowa in dealing with a related question expressly indicates that it does not overrule the principal case, because of the doctrine of stare decisis, but it intimates that if the matter came before it de novo it would not follow Moore v. Monroe. See Knowlton v. Baumhover, 166 N. W. 202 (Iowa 1918).

student can be excused from attendance at such readings upon written application from the parents of such student. A taxpayer sued to enjoin the readings. The Court put the question thus:

"The precise question is not whether the pupil can be compelled to attend religious exercises, nor necessarily whether the reading of the Bible, or an extract from it, constitutes religious worship, but whether such reading of extracts from the Bible, at which reading pupils whose faith or scruples are shocked by hearing the passages read, are not required to attend, constitutes the teacher a teacher of religion, or amounts to a restriction of civil or political rights or privileges of such students as do not attend upon the exercises. Is the reading of extracts from the Bible a violation of the provisions of the Constitution which inhibits the diminishing or enlargement of the civil or political rights, privileges and capacities of the individual on account of his opinion or belief concerning matters of religion?" (P. 251.)

The Court held that the regulation did not infringe upon the constitutional rights of the taxpayer, saying:

"We do not think it can be maintained that this section has any application to the subject." (P. 251.) . . . "In my opinion the reading of extracts from the Bible in the manner indicated by the return, without comment, is not in violation of any constitutional provisions. I am not able to see why extracts from the Bible should be proscribed when the youth are taught no better authenticated truths of profane history. (P. 253.)

The Court further held that the taxing provision of the Constitution did not apply to the case. There was a vigorous, dissenting opinion which, we submit, was more judicial in character and more in accord with sound principles of law than the majority opinion.

(v) Church v. Bullock, 109 S. W. 115 (Texas, 1908). According to the Constitution of Texas, Article 1, par. 6, the state cannot compel a person to support any church or minister by taxation or otherwise, and cannot compel any person to go to any church service.

The school authorities order "opening exercises" to be held in the public schools. The details of the service are left to the local school principals and teachers. Such exercises are held. They consist of Bible reading, patriotic hymns and songs and the reciting of the Lord's prayer. The children are invited but not compelled to join in the Lord's prayer. They are *invited* to stand up or bow their heads during the prayer. But they are *not compelled* to stand up or bow their heads. They are, however, *compelled to be present* and are marked "tardy" if they are absent. The services are supposed to be non-sectarian. The parents of the Jewish and Catholic children object to the services and ask that they be enjoined. The question was whether or not the services were in derogation of religious freedom. The Court held that they were not, that the school house did not become a place of worship during the time the services were held and that the services were non-sectarian.

(vi) Wilkerson v. City of Rome, 110 S. E. 895 (Ga., 1922). The Constitution of Georgia reads, in part, as follows:

"Article 1, par. 12. All men have the natural and inalienable right to worship God, each according to the dictates of his own conscience, and no human authority should in any case control or interfere with such right of conscience.

Par. 13. No inhabitant of this state shall be molested in person or property, or prohibited from holding any public office or trust, on account of his religious opinions; but the right of liberty of conscience shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

Par. 14. No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or of any sectarian institution."

The authorities of the City of Rome passed an ordinance reading as follows:

"The Board of Education shall require some portion of the King James version of the Bible, of either the Old or the New Testaments to be read, and prayer offered to God in the hearing of the pupils of the public schools of the City of Rome daily during the regular sessions of these schools and that such time should be allowed and appointed for these exercises as will admit of their being conducted with order and impressiveness. That these readings and prayers shall be conducted

by the principals of said schools, or by persons invited by them for such services, and the selection of Scriptures to be read shall be made by the persons conducting them, and the readings shall be without comment. Be it further ordained by the authority aforesaid, that exemption from attendance on such readings and prayers shall be granted to any pupil or pupils whose parents or guardians shall present to the superintendent of schools request in writing for such exemption upon the grounds of conscientious objections."

After the ordinance was passed the School Board refused to comply with the ordinance. The city sued out a writ of mandamus to compel the School Board to comply. Two questions were raised: (1) Is reading the King James version of the Bible aiding a Protestant sect of the Christian religion, and (2) Does the ordinance violate the Constitution? The Court held in the negative on both questions, although there was a very vigorous dissenting opinion by a member of the court.

The immediately foregoing cases are presented here as holding generally that compulsory sectarian religious instruction in the public schools is constitutional not because these cases, on their facts, are really in support of this proposition but because they are constantly quoted by some courts as so holding. But it is to be noted that in each case the Court goes to great pains to distinguish away, on the facts, each situation so as not to give utterance to the fact that the Constitution does really permit of holding compulsory, religious, sectarian services in the public schools. It is further to be noted that the courts stress particularly the fact that those pupils who so wish may be, and are, excused from attendance. They emphasize strongly the fact that so far as those who are excused are concerned no compulsory element is present.

In regard to these cases a Court has well said:

"If here and there may be found a case in which to our thought (i. e., that such services are unconstitutional), the fundamental principle has seemingly been disregarded, and examination thereof will show in every instance that the true principle is not denied, and that the decision is sought to be justified on the theory that the facts were insufficient to bring the case within the scope of the rule.

In a few other cases where the facts have brought them dangerously near a breach of the constitutional and statutory inhibitions, the matter has been glossed over by pointing out that the pupils objecting to the practice complained of were not required to take part therein or could be excused therefrom at the request of their parents. . . . This reason is very aptly answered by Orton, J., in State v. Board, 44 N. W. 967."[42]

The statement to which the learned judge referred is as follows:

"They (the pupils) ought not to be compelled to go out of the school for such a reason for one moment. The suggestion itself concedes the whole argument. That version (King James) of the Bible is hostile to the beliefs of many who are taxed to support the common schools and who have equal rights and privileges in them. It is a source of religious and sectarian strife. That is enough. It violates the letter and the spirit of the Constitution."[43]

It is submitted that the position taken by Judge Orton is unassailable. To force a child to leave the public schools in order to avoid that which offends his religious scruples shows that there is that in the public schools which ought not to be there. The right to attend a public school without having his religious convictions violated is a "natural right" of the pupil which all constitutional guarantees of freedom of religion are meant to protect.

Summary. The foregoing cases indicate that there is a rather weak minority among the courts, who, relying on fallacious reasoning and very specious examinations of the facts in the several cases, hold that compulsory, sectarian, re-

(42) Ibid, page 211.

(43) State v. Board, 44 N. W. 967, 981. To the same effect see People v. Board, 92 N. E. 251, 256. where the court said: "The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with other pupils, subjects him to a religious stigma and places him at a disadvantage which the law never contemplated. All this is because of his religious belief."

ligious instruction in the public schools is constitutional. It is submitted that these cases are wrong on principle. As a Court has recently said:

"The spirit which would make the state sponsor for any form of religion or worship, and the religion, whether Protestant or Catholic, which would make use of any of the powers or functions of the state to promote its own growth or influence, are un-American; they are not native to the soil; they are inconsistent with the equality of right and privilege of freedom of conscience which are essential to the existence of a true democracy."[44]

Conclusion. Having regard to the very small number of cases which have considered the grave questions here discussed,[45] the varying language of the several constitutions and statutes under which the cases arise and the striking difference in results obtained by the conflicting decisions, all conclusions reached must necessarily be quite tentative. This is particularly true when there has not been, and by the very nature of the case, there cannot be, any decision in the United States Supreme Court which can be relied upon in case of doubt or of differing opinions in the several State Courts. But the cases do, we believe, lead to some sound and general conclusions:

1. The spirit of the various constitutional provisions guaranteeing religious freedom leads to the protection of religious beliefs from any, even the subtlest, attacks which may be made upon them. All religions are placed upon a legal equality. One is not to be advanced at the expense of another. Religionists of one sort are not to be harassed because of the beliefs or the official positions of religionists of another sort. The State cannot teach, nor compel instruction in or learning in, any form of religion.

2. The Bible is a book of religion. It is a sectarian book of religion. The fact that it includes the religious beliefs of nearly all divisions of Christianity and Judaism and is closely allied to the sacred book of the Mohammedans does not make it into a non-sectarian book of religion.

3. Reading is a form of instruction and study. Bible reading is a method of giving instruction in the Bible. Hence, it is a form of giving instruction in sectarian religion. Bible reading in the public schools is the giving of sectarian religious instruction in the public schools.

4. As most of the States in the Union have compulsory school laws, and as most of the children in the country cannot afford to attend private schools, most children have to attend the public schools. To compel them to listen to Bible reading is to compel them to receive instruction in sectarian religion. In so far as the religion that is taught to them is not the religion which their parents or guardians profess or desire to have taught to them, the religious instruction which they receive is given in violation of the constitutional provisions which purport to protect religious beliefs and opinions of the citizens of the several states.

5. Excusing pupils from attendance at Bible reading, or religious services, in the public schools upon request of parents or guardians of the children does not avoid the constitutional prohibitions. It simply places an illegal choice upon the parents. They must either send their children to schools where religious beliefs of which they do not approve are taught or else they are compelled to refrain from using the public schools so that their religious beliefs may remain inviolate. Placing the burden of such a choice upon citizens of the country is un-American.

(44) Knowlton v. Baumhover, supra note 41.

(45) An interesting question which is collaterally related to the one discussed here but which space will not permit of working out is this: Does a school room become a place of worship during the time that religious services are held therein so as to give a taxpayer a ground of complaint that the public monies are being used for religious purposes? The cases are very few that deal with this problem. Those who are interested to pursue the matter further may look at the following: State v. Board, 156 N. W. 477; Moore v. Monroe, 20 N. W. 475; Knowlton v. Baumhover, 166 N. W. 202; State v. Dilley, 145 N. W. 999; Evans v. Selma Union High School District, 222 P. 801; State v. Board, 44 N. W. 967.

INSURANCE—DOUBLE INDEMNITY CLAUSE

BROWN v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA

8 F. (2d) 996

(Circuit Court of Appeals, Fifth Circuit, November 25, 1925)

Passenger, killed by fall of hydroaeroplane, was not killed in conveyance of "common carrier," within double indemnity provision of accident policy, where owner of plane carried only white people and flew only when and under such conditions as he pleased.

J. K. Dixon, of Talladega, Ala. (Knox, Dixon, Sims & Bingham, of Talladega, Ala., on the brief), for plaintiff in error.

Geo. W. Yancey, of Birmingham, Ala. (London, Yancey & Brower, of Birmingham, Ala., on the brief), for defendant in error.

FOSTER, Circuit Judge. This is a suit on a policy of accident insurance which provided for double indemnity if the bodily injury was sustained "while in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service." The insured was killed in an aeroplane accident, while a passenger in said plane. Suit was brought for double indemnity, claimed by virtue of the above-quoted clause. The defendant admitted liability for the face value of the policy and tendered that amount, which was declined by plaintiff. At the close of the case the District Court directed a verdict for plaintiff for the amount tendered, denying the claim for double indemnity.

The following facts are not disputed: Lieutenant Whitted, formerly in the naval aviation service, owned a hydroaeroplane and operated it himself at Camp Walton, Fla., a summer resort, where he took passengers on pleasure trips in the air to let them enjoy the doubtful pleasure of flying. The plane held six persons, including the pilot. The trips lasted about 10 minutes in the air, and the plane returned to the point from which it started, for which he charged his passengers $5 each. He would not go up with less than three passengers and carried only white people. He operated on such days, at such hours, and under such conditions as pleased him, and did not pretend to maintain regular schedules. He did not advertise his business, unless keeping his plane anchored at the resort and having his helper in the vicinity of the usual landing place to give information could be so called. On August 19, 1923, Hugh D. Brown, the insured, who was visiting Camp Walton with his wife, went up with Whitted and three others. When up in the air, something went wrong with the machine; it fell, and all were killed.

From the above-quoted facts it is clear that Whitted was not a common carrier. He assumed no duty to the public to carry them, and if he refused to do so without any reason at all no action would lie against him. See Hutchinson on Carriers (3d Ed.) §§ 47, 48.

Affirmed.

NOTE—*Death in hydroaeroplane as within double indemnity clause of accident policy.*—This case appears to be one of first impression in respect to the particular facts, and it is published in full on that account.

ITEMS OF PROFESSIONAL INTEREST

VICTIMIZING LAWYERS

Post Office Department,
Cincinnati, Ohio, January 28, 1926.

Dear Sirs:

Clever swindlers are making a specialty of victimizing lawyers throughout the country by working a fraud scheme involving the use of worthless checks. This scheme, in substance, is as follows:

A stranger calls at a lawyer's office and leaves a sham note for immediate collection from some party residing at a distance, explaining that this party is perfectly good for the amount and that the note would not be turned over to the lawyer for collection but for the fact that the money was sorely needed. The address which the stranger gives as that of the maker of the note is simply a fictitious address for himself or a confederate. When the lawyer's letter demanding payment of the note is received at the fictitious address a reply is made at once, enclosing a bogus check to meet the note or the major part thereof, and in the latter case promising to remit the balance in a few days. Such check, as usually prepared, is a skillful counterfeit of a cashier's check, with the amount indented by means of a protectograph, and seems above suspicion. As soon as sufficient time elapses for the letter enclosing the check to reach the lawyer's office, the stranger again calls and makes inquiry as to the progress of the collection, and when informed that the check has arrived, endeavors to prevail on the lawyer to let him have the money or part of it without delay. If successful in this respect, the stranger promptly vanishes before it can be discovered that the check is worthless. The losses thus sustained by lawyers have been heavy, running into thousands of dollars.

It is thought that perhaps you might see fit to warn your subscribers against this fraudulent scheme by giving suitable publicity to the above information gratuitously. Attempts to work this trick, whether successful or not, should be reported immediately by wire or telephone, Government rates, collect to the Post Office Inspector in Charge having jurisdiction in the State where the offense was committed. Such reports may be made direct or through the local postmaster. Of course, steps should be taken to have the offenders detained by the local authorities, pending action by the post office inspectors.

Respectfully yours,

G. F. H. BIRDSEYE,
Inspector in Charge.

The American Bar Association Journal for February prints this warning, along with two letters from attorneys who have been annoyed, one by being impersonated and by the impostor claiming to be a relative of the other. Lawyers will save themselves annoyance, if not loss of money, by giving no credence to any such hard luck story as these letters relate.—(EDITOR.)

RECENT DECISION BY THE NEW YORK COUNTY LAWYERS ASSOCIATION

COMMITTEE ON PROFESSIONAL ETHICS

Question No. 238

(a) Is it proper for an attorney to own shares of stock in a corporation organized for the purpose of conducting a collection business?

(b) Would it make any difference if the attorney owned a controlling interest in such corporation, it being the practice of this corporation to engage solely in the business of making collections without suit, and no representations are made to the effect that attorneys are identified with such corporation, nor are any attorneys recommended by the corporation, unless such recommendation is requested by one of its customers?

Answer No. 238

In the opinion of the Committee such are the opportunities for abuse of the proper principles of professional conduct, which have been illustrated by many previous answers of this Committee, through utilizing the Collection Agency as a cloak for conduct which would in the lawyer be improper, that the Committee concludes that the practice suggested should be discouraged; although the Committee recognizes that there is no inherent impropriety in the mere ownership of shares, whether a majority or otherwise, provided the lawyer does not utilize or control it for purposes above indicated, which the Committee deprecates.

FLEXIBLE TARIFF CONTESTED AS UNCONSTITUTIONAL

There is now pending for decision before the Board of United States General Appraisers (the trial court in customs cases), a case involving the constitutionality of the so-called Flexible Tariff.

The President, by proclamation, advanced the rate of duty as fixed by the Tariff Act of 1922, from four to six cents per pound upon barium dioxide. Counsel for the plaintiffs claims that the act is unconstitutional because it is an illegal attempt to delegate legislative power and the taxing power, to the Executive, and that finding differences between the cost of production at home and abroad is not "a fact" which Congress can commission the Executive to find.

A decision is awaited with much interest on account of the current discussion concerning the Tariff Commission, and because the suit raises points never yet considered by the United States Supreme Court.

The first appeal is from the decision of the collector, following the proclamation of the President, to the Board of U. S. General Appraisers, and from its decision to the United States Court of Customs Appeals at Washington, and thence to the Supreme Court, where the question is certain ultimately to be finally decided.

BOOK REVIEW

LYCURGUS

Lycurgus or The Future of Law, is a small volume by E. S. P. Haynes, author of Divorce As It Might Be, The Enemies of Liberty, etc. The book is published by E. P. Dutton & Company, 681 Fifth Avenue, New York.

Mr. Haynes deals, for the most part, with the laws in English speaking countries, but considers continental law and suggests some valuable changes in British law whereby it may be brought more in harmony with the law of not only the Continent but the United States as well. The author insists that marriage and divorce laws, criminal law, law for the poor, land laws, corporation laws, private international law are all badly in need of reform, and he indicates what direction the future reform will probably take. Quoting at length from eminent American jurists, the author presents a comparative picture of American and British methods, thereby giving his volume an international interest.

The book belongs to the Today and Tomorrow Series, gotten out by Dutton & Company, and it is suggested that the reader write for a list of these interesting books.

DIGEST

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Animals**—Vicious Dog.—Jury may infer vicious disposition of dog from single act of dog, especially if it is an attack on a person; the law not requiring any particular number of instances of unprovoked attack or injury to show vicious disposition.—Perazzo v. Ortega, Ariz., 241 Pac. 518.

2. **Attorney and Client**—Attorney's Purchase of Property in Litigation.—In suit by client against his former attorney to compel transfer of stock which was affected with trust in plaintiff's favor, defendant was not entitled to claim that plaintiff should reimburse him for money which he paid out to acquire stock, and hold it adversely to plaintiff.—Martin v. Dixon, Nev., 241 Pac. 213.

3.——Notice to Attorney.—Rule that notice to attorney is notice to client applies only where knowledge of attorney is acquired while acting for client and relates to matter within scope of his agency.—Vital v. Jandorf, N. Y., 212 N. Y. S. 548.

4. **Automobiles**—Contributory Negligence.—In an action for personal injuries from street car alleged to be due to defendant's backing of automobile into street intersection, held that failure of plaintiff to anticipate that automobile might so back up would not constitute contributory negligence, as matter of law, since backing of automobile, without warning, over space reserved for use of pedestrians, is act of negligence, and plaintiff could not be presumed to know that negligent act would be committed.—Askin v. Moulton, Md., 131 Atl. 82.

5.——Driver's Negligence.—Driver of car held not negligent as matter of law in driving in the nighttime close to edge of embankment when meeting another car, though no necessity therefor existed, where there was no indication that the embankment was undermined by flowing water.—Wilson v. Coe Twp., Isabella County, Mich., 206 N. W. 355.

6.——Liability of Owner.—Under police power, state may declare automobile a dangerous instrumentality, and make owner liable for damage through negligent use of car by another with his consent.—Seleine v. Wisner, Iowa, 206 N. W. 130.

7.——Other Insurance.—That insurer in automobile policy containing a clause against taking of other insurance knew a few days before the car burned that insured mortgagor had effected other insurance on the car, and failed to object or notify mortgagee, held not waiver of clause prohibiting taking of other insurance.—Wyley v. Federal Ins. Co., Wash., 241 Pac. 292.

8.——Owner's Liability.—Under family automobile doctrine, where father turns over his automobile to his family for family use, he is liable for injuries caused by its negligent operation while so intrusted to a member of his family.—Watts v. Lefler, N. C., 130 S. E. 630.

9.——Taxation.—The tax upon motor vehicles using the public highways is fixed with reference to the use made of such highways. Although primarily a property tax, it is made to operate as a privilege tax, for such vehicles are prohibited from using the public highways until the tax is paid.—Raymond v. Holm, Minn., 206 N. W. 166.

10. **Bankruptcy** — Estate by Entirety. — Under Bankruptcy Act, § 70a (5), being Comp. St. § 9654, and law of North Carolina, land held by bankrupt and his wife by the entireties is not part of bankrupt's estate, and petition to sell bankrupt's interest therein is properly denied.—In re Kearns, U. S. C. C. A., 8 F. (2d) 437.

11.——Jurisdiction. — The appellate court held without jurisdiction of an appeal from an order dismissing an involuntary petition, where one of the petitioning creditors, whose presence was necessary to make the requisite number, was joined as an appellant in violation of its express direction in writing.—In re Carasaljo Hotel Co., U. S. C. C. A., 8 F. (2d) 469.

12.——Jurisdiction.—Federal court held "court of competent jurisdiction" within New York Banking Law, § 161, to direct state superintendent of banks to turn over to trustees in bankruptcy certain securities deposited by bankrupt private bankers pursuant to such statute, to be liquidated and distributed in accordance with section 156, where bankrupts had been duly adjudicated bankrupts in federal court, and trustees were duly qualified and acting, and claims of depositors and general creditors being required to be proven in such court as provided in Bankruptcy Act (Comp. St. §§ 9585-9656).—In re Bajardi, U. S. D. C., 8 F. (2d) 551.

13.——Mortgage.—Facts concerning execution and assignment of mortgage on property in hands of trustees in bankruptcy, foreclosure of which was sought by assignee, held such as to require thorough investigation by trustees and justifying direction for sale of property by trustees, free and clear of all incumbrances, with provision for determination of conflicting claims to proceeds.—In re Dyer, U. S. D. C., 8 F. (2d) 376.

14.——Preference.—In absence of statute, bankrupt's assignment, some months before institution of bankruptcy proceedings, of accounts due, is effective to pass ownership of such accounts, and gives assignee preferential rights to proceeds when collected by trustee in bankruptcy or bankrupt receiver.—Chapman v. Emerson, U. S. C. C. A., 8 F. (2d) 353.

15.——Referee's Authority.—Order of referee, requiring collector of internal revenue to file government's claim for taxes within stated time, and his refusal to allow claims for additional income tax not levied at time of order and filed after expiration of such time, though long before declaration of final dividend, under Bankruptcy Act, § 65b (Comp. St. § 9649), held in excess of his authority under section 64a (Comp. St. § 9648).—In re Bates Machine & Tractor Co., U. S. D. C., 8 F. (2d) 424.

16. **Banks and Banking**—Act of Cashier.—The acts of the cashier of a bank in accepting bonds for safe-keeping, with an agreement to insure were within the scope of his employment, and the agreement to insure was not ultra vires.—Blomberg v. State Bank of Ogden, Kan., 241 Pac. 242.

17.——Authority of President.—When president was in complete charge of bank and his situation and conduct justified the belief he had the same control over the bank as when it was under his private control, held bank was liable for president's assumed acts of authority in purporting to act for it in sale of securities to plaintiff, unless such acts were ultra vires, and was legally bound to deliver securities purchased.—Weissburg v. People's State Bank, Pa., 131 Atl. 181.

18.——Certificate of Deposit.—One who deposited in a state bank money, and received therefor a time certificate of deposit not subject to check and bearing interest before, but not after, maturity,

who, neither before nor after maturity, presented the certificate for payment, or delivered it to or left it with the bank for deposit, held not depositor, protected by the state guaranty fund, within the meaning of Rev. St. 1911, art. 486; she being the holder either of a past-due certificate of deposit, and therefore a creditor of the bank, or the holder of a past-due noninterest bearing certificate of deposit, neither of which is protected under Acts 38th Leg. (1923), c. 150.—Austin v. Avant, Tex., 277 S. W. 409.

19.——Liability of Indorser.—Contract by which president of bank agreed with indorser, a director of the bank, without qualification on note, that indorser should not be liable in case maker defaulted in repayment of money loaned to him on note by bank, thereby misleading board of directors of bank into believing that bank would be protected against loss on note by such unqualified indorsement, held illegal and unenforceable.—Beers v. Broad & Market Nat. Bank, N. J., 131 Atl. 105.

20.——Title to Deposit.—Deposit of check representing proceeds of live stock shipment in defendant bank, with instructions by shipper's agent to place to credit of shipper's bank for shipper's account held not deposit for collection only, but one under which title to deposit passed to designated bank, whose disposition of proceeds defendant was under no duty to supervise; "to the credit of" meaning cash credit and being equivalent to unequivocal direction to pay over money.—Sisseton Live Stock Shipping Ass'n v. Drovers' State Bank, Minn., 202 N. W. 394.

21. **Bills and Notes**—Innocent Holder.—Although, under Negotiable Instruments Act, § 25, a pre-existing debt constitutes "value," holder, who took note signed by corporation by its treasurer in payment of personal obligation of treasurer, cannot claim immunity as innocent holder, as very form of paper itself is sufficient to put him on his guard in view of sections 52, 57, and 58.—Gilman v. F. O. Bailey Carriage Co., Me., 131 Atl. 138.

22.——Knowledge of Purchaser.—Knowledge by a foreign corporation, purchaser in its home state, of a promissory note from the payee, a mining corporation of the same state, that such promissory note was given in Idaho for shares of stock of the payee of what might be conceded to be a speculative character, and the further knowledge that at the time of purchase payee was unable to pay in cash all of its operating expenses and therefore transferred such note, charges the purchaser neither with notice that such stock was sold in violation of C. S. c. 187, prescribing conditions precedent to the right of foreign corporations to do business in this state and in violation of C. S. c. 206, known as the Blue Sky Law, nor with the duty of inquiry into the transaction out of which the note originated.—Butte Machinery Co. v. Jeppesen, Idaho, 241 Pac. 36.

23. **Carriers of Goods**—Duty to Unload.—The duty of a consignee to unload cars within the free time given by the tariffs of a carrier, and the obligation to pay demurrage for their detention, are classified with those imposed by law, and where the failure of a consignee to unload within the free time is caused entirely by the intervention of a vis major, the consignee is not liable for demurrage.—Chesapeake & O. Ry. Co. v. Board W. Va., 130 S. E. 524.

24. **Constitutional Law**—Sterilization of Defectives.—Acts 1924, c. 394, providing for sexual sterilization of certain defectives, and vesting special board of directors of State Colony for Epileptic and Feeble-Minded, after notice according to law with jurisdiction to determine petition for sexual sterilization of an inmate thereof, complies with requirements of due process of law.—Buck v. Bell, Va., 130 S. E. 516.

25.——Teacher's Contract.—A teacher whose services are to be paid for by the state school fund is not a public officer, and his valid contracts cannot lawfully be destroyed or impaired by subsequent legislation, as such contracts are within the protection of Const. art. 1, § 12, and Const. U. S. art. 1, § 10, prohibiting passage of laws impairing obligation of contracts.—State v. Blied, Wis., 206 N. W. 213.

26. **Contribution**—Joint Tort-Feasors.—Generally, there can be no contribution or indemnity among tort-feasors, except where the party claiming indemnity has not been guilty of any fault except technically or constructively, or where both parties have been at fault, but not in the same degree, and the fault of party from whom indemnity is claimed is the primary and efficient cause of the injury.—Bowman v. City of Greensboro, N. C., 130 S. E. 502.

27. **Corporations**—"Doing Business."—Evidence that corporation, acting as general agent of several insurance companies, authorized resident agent to solicit insurance in Y. county, through use of blank applications furnished, and that policies were issued and countersigned by corporation as general agent, and forwarded to resident agent, who delivered policies, collected premiums, deducted commission, and sent remainder to general agent, together with other evidence, held to show that corporation was "doing business" in Y. county, in contemplation of Rem. Comp. Stat. § 206, and hence courts of that county had jurisdiction of an action brought against it.—State v. Superior Court, Wash., 241 Pac. 303.

28.——Stockholder's Liability.—Stockholder cannot make legal contract with corporation, relieving him from liability to creditors for unpaid stock subscriptions, under Stock Corporation Law, § 56.—Granger & Co. v. Allen, N. Y., 212 N. Y. S. 356.

29. **Covenants**—"Grocery."—Covenant not to use store for any business whatsoever except a fruit and grocery store held not to exclude use thereof for sale of vegetables; "grocery" being a place for selling general supplies for table and household use.—Private A. S. Realty Corporation v. Julian, N. Y., 212 N. Y. S. 430.

30. **Criminal Law**—Sterilization of Defectives.—Acts 1924, c. 394, providing for sexual sterilization of certain defectives, is not a penal statute, and does not violate Bill of Rights, § 9, prohibiting cruel and unusual punishment.—Buck v. Bell, Va., 130 S. E. 516.

31. **Death**—Presumption of.—Presumption of death from absence of five years under Burns' Ann. St. 1914, §§ 2747-2752, has relation only to management and disposal of absentee's estate, and does not control in determining rights of parties under contracts of insurance on absentee's life.—Prudential Ins. Co. v. Moore, Ind., 149 N. E. 718.

32. **Explosives**—Negligence.—In action for damages for personal injuries to child from explosion of dynamite cap picked up on defendants' premises, plaintiff to recover was not required to show that he was on premises on express invitation of defendants and not as trespasser, where he was in habit of visiting defendants' premises and they were aware of his presence.—Fisher v. Burrell, Ore., 241 Pac. 40.

33. **Gaming**—Slot Machine.—A slot machine which delivered a package of mints every time a nickel was put in, and in addition sometimes delivered trade chips, though containing indicator telling purchaser in advance what would be received, held a "gambling device," within Code 1924, §§ 13202, 13203.—State v. Ellis, Iowa, 206 N. W. 105.

34. **Garage Keepers**—Due Care.—Defendant maintained a garage for the "dead storage" of automobiles. Plaintiff's machine was stolen and taken out through a sliding door. The door was locked by means of a three-eighths inch chain passing through it and around the doorpost and secured by a padlock. The thieves gained entrance by cutting the chain. Whether the manner of securing the door amounted to due care is a question of fact.—Harding v. Shapiro, Minn., 206 N. W. 168.

35. **Highways**—"Center of Highway."—The center of the highway as used in Rev. St. 1919, § 7589, requiring motor vehicles in meeting or passing horse-drawn vehicles to reasonably turn to right of center of the highway, means center of traveled part of highway.—Darnell v. Ransdall, Mo., 277 S. W. 372.

36. **Homestead**—Half Interest.—One who is the owner, subject to a mortgage executed by him, of an undivided one-half interest in real property which he occupies as a residence, is not precluded from claiming as against creditors a homestead right therein by paying rent to his cotenant.—Blitz v. Metzger, Kan., 241 Pac. 259.

37. **Husband and Wife**—Lien Notes.—Wife held not necessary party to suit on vendor's lien notes executed by her and her husband, where it did not appear that debt, for which notes were given, was for necessaries, or that it was connected with her separate estate, and no issue of homestead was in case.—Ruby v. Davis, Tex., 277 S. W. 430.

38. **Insurance**—"Accidental Means."—An injury is not "result of accidental means" under accident insurance policy, where it is direct, though unexpected, result of an ordinary act in which insured intentionally engages.—Bahre v. Travelers' Protective Ass'n, Ky., 277 S. W. 467.

39.——Amendment.—Where a policy of industrial insurance contained the provision, "No condition or provision of this policy shal be waived or altered except indorsement attached hereto signed by the president, a vice-president, secretary, or assistant secretary of the company, or by a registrar of the company when specially authorized so to do by a printed indorsement attached hereto; nor shall notice to any agent, nor shall knowledge possessed by any agent, or by any other person, be held to effect a waiver or change in any part of this contract"—a general agent of the insurer had no authority to enter into a subsequent agreement amending the terms of the policy so that it would provide insurance and protection to others not originally included within its provisions.—Gainous v. Georgia Casualty Co., Ga., 130 S. E. 540.

40.——Appraisal.—Under fire insurance policy on buildings and property therein, containing coinsurance clause, and agreement for appraisal, held that it was duty of appraisers to ascertain value and appraise damage to damaged buildings only, or at least to state such value and damage separately, and, in stating value of both damaged and undamaged buildings in lump sum they exceeded their powers, rendering their award without binding force or effect.—Mound City Roofing Tile Co. v. Springfield F. & M. Ins. Co., Mo., 277 S. W. 349.

41.——Breach of Warranty.—Provision in marine insurance policy that ship should sail from designated port by designated day constituted warranty, breach of which excused insurer from liability.—Northland Nav. Co. v. American Merchant Marine Ins. Co. of New York, N. Y., 212 N. Y. S. 541.

42.——Hazardous Employment.—In view of Workmen's Compensation Law, § 55, where insurance carrier intended to and did insure drivers of teams hauling gravel to repair highways in town, it was estopped by statute from contesting that employment was hazardous, or that it was carried on for pecuniary gain, or from denying that policy covered claim of injured laborer.—Kittle v. Town of Kinderhook, N. Y., 212 N. Y. S. 410.

43.——Mortgage.—Where policy of insurance on automobile against fire, containing usual conditions against other insurance, and standard indorsement clause providing for payment to mortgagee as his interests might appear, was issued to mortgagor, who paid the premium, act of mortgagor in taking another policy on the car precluded recovery by mortgagee, notwithstanding standard indorsement clause specifically referred to mortgagee as payee.—Wyley v. Federal Ins. Co., Wash., 241 Pac. 292.

44.——Peril of the Sea.—Damage to cargo is due to wind, a peril of the sea, and so covered by policy, where cargo was injured by rain which would not have reached the cargo, had it not been driven by the wind, making the wind the proximate cause.—Prejean v. Delaware-Louisiana Fur Trapping Co., U. S. D. C., 8 F. (2d) 357.

45. **Interstate Commerce**—Foreign Corporation.—Contract executed by Illinois corporation for sale of refrigerating machine to Michigan corporation, to be shipped to latter from Illinois, held transaction in "interstate commerce," character of which was not affected by provision for furnishing an erecting engineer at service and expense of buyer, and hence such contract could not be burdened by Pub. Acts 1921, No. 84, pt. 5, c. 1, requiring foreign corporation to secure certificate of authority for transaction of business in Michigan.—Westerlin & Campbell Co. v. Detroit Milling Co., Mich., 206 N. W. 371.

46.——License Tax.—Ordinance enacted under Rev. St. Mo. 1919, § 9006, which required every manufacturer to take out a license and pay a license tax of $1 on each $1,000 of sales made, held not invalid as a burden on interstate commerce, though tax was collected on goods sold to purchasers in other states, since tax was based on value of goods manufactured, arrived at from sales made.—American Mfg. Co. v. City of St. Louis, Mo., U. S. C. C. A., 8 F. (2d) 447.

47. **Intoxicating Liquors**—"Moonshine."—Indictment charging defendant with possession of spirituous liquor, to wit, moonshine whisky, not for any of the excepted purposes, held sufficient to charge offense of possessing intoxicating liquors, in view of Cr. Code Prac. § 122, subd. 2, and section 137, notwithstanding failure to allege that moonshine whisky was an intoxicating liquor; "spirituous" meaning alcoholic, ardent, as spirituous liquors, and "moonshine" meaning illicit liquor, as moonshine whisky.—Kenny v. Commonwealth, Ky., 277 S. W. 480.

48. **Landlord and Tenant**—Lease.—Where lessee exercised option in lease to renew lease for an additional five years by giving written notice, there was no new letting, but holding was for a continuous ten-year term, and additional term could only be terminated in same manner as original term.—Williams v. Heckscher, N. Y., 212 N. Y. S. 685.

49. **Licenses**—Sale of Securities.—Blue Sky Law (Rev. St. 1919, § 11931), prohibiting sale or attempt to sell securities of an investment company except under certain conditions, applies, whether company is a domestic or foreign company.—State v. Farr, Mo., 277 S. W. 354.

50. **Master and Servant**—Condoning Prior Negligence.—While knowledge of and condonance by an employer of prior acts of misconduct and negligence of an employee will not justify discharge of the latter, yet if such acts be subsequently repeated, the entire course of conduct of the employee may be taken into consideration by the employer as justification for the discharge of the employee.—Gordon v. Dickinson, W. Va., 130 S. E. 650.

51.——Hazardous Occupation.—An employee, who was injured while he was operating a wood saw for his employer who was engaged in such business, held entitled to compensation for injury as being engaged in a "hazardous occupation," within Or. L. § 6617, subd. 1, not incidental to farming, within sections 6618, 6619.—Freeman v. State Industrial Accident Commission, Ore., 241 Pac. 385.

52.——Heat Stroke Not "Accident."—Where death of employe hauling sand into a foundry with a wheelbarrow was the result of a heat stroke contracted in the course of his employment, from a combination of occupational and physical conditions, and without trauma, such death held not compensable under Ky. St. § 4880, as "accident"; "heat stroke" being a depression of the vital powers due to exposure to excessive heat, and manifesting itself as prostration with syncope etc. (heat exhaustion), as prostration with insensibility, fever, etc. (true sunstroke), or, rarely, as acute meningitis; sunstroke, or insolation (in the wider sense).—Smith v. Standard Sanitary Mfg Co., Ky., 277 S. W. 806.

53.——Term of Service.—Where time was of essence of conditional employment requiring servant to take car to certain place for sale, and have it back same night, if he failed to sell it, master was not liable in damages to third person for negligence of erstwhile servant when returning car two days after employment expired by limitation; servant in making restoration acting for himself in performance of duty imposed by law, and not under duty emanating from terminated agency.—Palmer, Phinizy & Connell v. Heinzerling, Ga., 130 S. E. 537.

54. **Municipal Corporations**—Defect in Street.—Where two causes combine to produce an injury both in their nature proximate, the one being a defect in a city street and the other some accident for which neither party is responsible, the city is liable provided the plaintiff was not at fault and the injury would not have been sustained but for the defect in the street.—Starling v. City of Gainesville, Fla., 106 So. 425.

55.——**Defective Driveway.** — Plaintiff, stepping into open space between defendant's driveway and end of cut curb, held not guilty of contributory negligence as matter of law in not using driveway or concrete walk in passing from street to sidewalk, or in not stopping directly in front of store in which she intended to trade.—Melvin v. Kane, Tex., 277 S. W. 374.

56.——**Regulation of Jitneys.**—That plaintiff was operating jitney bus on streets of municipality at time it enacted ordinance regulating operation of such busses held not to prevent city from enacting ordinance nor exempt plaintiff from complying with it.—Denny v. City of Muncie, Ind., 149 N. E. 639.

57.——**Regulation of Taxicabs.**—An ordinance prohibiting taxicab stands on the streets within a certain area in a city, but not prohibiting their free use otherwise therein, and providing for the location of stands at other places outside of the designated area, is not void as constituting a prohibition rather than a regulation of the use of taxicabs within the designated area; the power of the city to regulate such vehicles being conceded.—State v. York, Fla., 106 So. 418.

58.——**Zoning Ordinance.**—A zoning ordinance held void in so far as it attempted to restrict erection of an apartment building with four stores combined; the restriction being not a proper exercise of the police power.—Steinberg v. Bigelow, N. J., 131 Atl. 114.

59. **Negligence** — Elevator. — Neither owners of building nor tenant thereof held liable on common-law principles to injured salvage corps man for failure to exercise care to protect him from falling into elevator shaft while on premises to save property endangered by fire.—Steinwedel v. Hilbert, Md., 131 Atl. 44.

60. **Oil and Gas**—"Commencing" Drilling.—Oil and gas lease requiring lessee to "commence" drilling by a certain date, though containing no stipulation as to depth to which wells were to be drilled, required substantial compliance in good faith, and was not complied with by installing rig previously used in drilling water wells and drilling hole 18 or 20 feet deep merely to hold lease.—Street v. Masterson, Tex., 277 S. W. 407.

61.——**Lien for Labor.**—The tools and equipment used in the sinking of an oil and gas well, which forms no part of the well or completed work, is neither "labor nor material" within the meaning of the lien statute.—Marion Machine, Foundry & Supply Co. v. Allen, Kan., 241 Pac. 450.

62. **Railroads** — Defect in Crossing.—Following Juznik v. Railway Co., 109 Kan. 362, 199 P. 90, it is held that a person driving an automobile is not necessarily guilty of contributory negligence in attempting to negotiate a defective railroad crossing when a train is within his view, if he has no knowledge of the defects and the train is such a distance away that he has ample time to pass over a reasonable safe crossing before the train can reach it, but where, by reason of the defects of which he was unaware until he was upon the crossing, his automobile skidded down the track and was ultimately stalled thereon, and where he had made diligent efforts to get it over the railroad track, but was unable to do so before the collision occurred.—Orr v. Atchison, T. & S. F. Ry. Co., Kan., 241 Pac. 437.

63. **Robbery** — Retaking Stolen Property. — One who through another's use of marked cards in a card game is induced to part with his money and place it under the other's control is not guilty of robbery in retaking it, though he uses force.—Fisher v. State, Tex., 277 S. W. 386.

64. **Sales**—Acceptance of Offer.—"O. K." indorsed by seller's executive officer on buyer's offer held acceptance of offer.—International Filter Co. v. Conroe Gin, Ice & Light Co., Tex., 277 S. W. 631.

65.——**Conditional Sales.**—Uniform Conditional Sales Act, §§ 5, 6, providing that conditional sales shall be recorded within 10 days after making, held intended to operate on only sales of property in Arizona or destined for use therein.—Bradshaw v. Kleiber Motor Truck Co., Ariz., 241 Pac. 305.

66.——**Consideration.**—In action on account for purchase price of washing machine, defendant's plea of total failure of consideration, in that machine was wholly worthless, was sufficient and filing of counterclaim was unnecessary.—Morton Electric Co. v. Schramm, Mo., 277 S. W. 368.

67.——**Delivery.**—Where contract for lighting plant for purchaser's home, to be delivered within a reasonable time, was signed June 3, and accepted and signed by seller on June 7, it cannot be said as matter of law that delivery on August 27 was not within a reasonable time.—Morgan v. J. B. Colt Co., Ga., 130 S. E. 600.

68.——**Fit for Purposes.**—In action on account for purchase price of washing machine, plaintiff's requested instruction that he was entitled to recover full amount, even though washing machine was unfit for defendant's purposes, held properly refused, as question of amount of verdict was for jury, and, although defendant relied wholly on his own judgment in purchasing machine, he had right to demand that it be mechanically perfect, and its failure in that respect was a valid defense.—Morton Electric Co. v. Schramm, Mo., 277 S. W. 368.

69. **Schools and School Districts—Benefits to Teachers.**—There being a contractual relationship between the state and its teacher, held that rights accruing to a teacher, and on his death to his beneficiary, under St. 1925, §§ 42.50 and 42.51 (3), giving additional benefits to teachers in service 25 years, and right to death benefit to his beneficiary, are of such nature as to be beyond power of Legislature, and hence Laws 1923, c. 416, repealing provisions as to additional benefits, is ineffective as to teachers then within or under such prior law.—Wis., 206 N. W. 213.

70. **Wills**—Life Estate.—A devise by a wife to her husband of "all my property, * * * to be used as he sees fit during his life, at his decease all that remains to be left to" C. and J., nephew and niece of the testatrix, "in equal shares," gives to the husband a life estate only and does not by implication confer upon the husband a power to convey the fee-simple title to real estate in Florida.—Brown v. Harris, Fla., 106 So. 412.

71. **Workmen's Compensation** — Apoplexy Not "Accident."—In a proceeding under the Workmen's Compensation Act (Pa. St. 1920, § 21916 et seq.), held that an apoplectic stroke suffered by claimant was not an accident within meaning of the Act, where there was no showing that it resulted from a shock, strain, or other injury to the physical structure of the body.—Gausman v. R. T. Pearson Co., Pa., 131 Atl. 247.

72.——**"Bonus" as "Earnings."**—Attendance bonus paid to refiner of aluminum ore because he worked seven days each week and turned off a certain amount of work held, under facts, to be compensation for services and "earnings" within Workmen's Compensation Act, § 2 (c).—Moss v. Aluminum Co., Tenn., 276 S. W. 1052.

73.——**Course of Employment.**—Store detective, struck by motorcycle, while returning home from court, where she gave testimony for employer in shoplifting case, was injured in course of employment, under Workmen's Compensation Law, § 2, subd. 4.—Gibbs v. R. H. Macy & Co., N. Y., 212 N. Y. S. 428.

74.——**Loss of Vision.**—In computing award under Rev. Code 1915, § 3193j, as amended by 32 Del. Laws, c. 186, § 2, for fractional loss of vision, award should be based on percentage of loss of vision without use of glasses.—Alessandro Petrillo Co. v. Marioni, Del., 131 Atl. 164.

75.——**Murder of Fellow Employe.**—Murder of employe and stockholder of coal company in hands of receiver, by brother of another employe and stockholder, while deceased, as was his daily custom, was waiting to make report, held to have arisen in course of employment, but not out of employment, within Compensation Act, where killing was because of trouble which had arisen because of differences between stockholders as to management of company to which receiver was not party.—Mercantile-Commercial Bank v. Koch, Ind., 150 N. E. 25.

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